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PP

v.

THOMAS SANTEKH SINGH

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HIGH COURT SABAH & SARAWAK, KOTA KINABALU

IAN HC CHIN J

[CRIMINAL TRIAL NO: K47-05-2002]

6 AUGUST 2002

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CRIMINAL LAW: *Dangerous Drugs Act 1952 - Trafficking in methamphetamine - Possession of cannabis - Drugs hidden underneath console box and behind glove box of car hired by accused - Failure to prove prior hiring history of car - Failure to adduce evidence that accused was the one who concealed drugs - Whether fatal - Whether no prima facie case - Dangerous Drugs Act 1952, s. 37(d) - Applicability*

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The accused was charged with offences under the Dangerous Drugs Act 1952 when 60.45 grams of methamphetamine and 17.53 grams of cannabis were found hidden in the car he was driving. The facts showed however that the car was not owned by the accused, but was hired by him from a public car rental company. At the trial, the prosecution did not lead any evidence to show that the accused was the one who had concealed the dangerous drugs in the car, and nor was there any attempt made to relate the hiring history of the car prior to it being rented out by the accused. This being the case, before the learned judge, a question arose as to whether the accused, on the facts and the evidence, could be said to be having custody or control, and hence possession and knowledge of the drugs. The evidence further showed that the accused, when asked by the police at the time of his arrest as to whether there was 'anything unlawful or drug' in the car, denied to placing any such thing in the car and further said that the car was a hired car. In the circumstances, a question also arose as to whether these answers of the accused showed that he had knowledge or custody or control of the drugs in question.

*e**f**g***Held:***h*

[1] As the car was for public hire an account must be given as to the state of the car before it was rented by the accused. It is vital for the prosecution to establish that before the car was handed to the accused the drugs were not in the places in which they were later found. Unless that is established, one cannot draw the inference that the drugs were

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placed in those places by the accused after he took possession of the car. The possibility cannot be ruled out that the drugs were placed there by a previous hirer of the car or even by the informer. (p 901 g)

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[1a] When the above inference cannot be drawn, evidence is necessary to show that it was while the car was in the possession of the accused that the drugs were concealed in the car. There is no such evidence with the result that it cannot be concluded and neither are there circumstances to justify the inference that the accused knew the drugs were hidden in those places of the car. Without the knowledge, the accused cannot be said to be in custody or control of the drugs. (pp 901 h & 902 a)

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[2] The prosecution ought to have revealed not only the history of the possession of the car before 19 November but also between 19 November and 29 November, when the car was in the possession of the accused, so as to show that there was no possibility of any one else other than the accused who could have placed the drugs in the car. Clearly, such evidence is missing. (p 902 b-c)

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[3] The circumstances and the manner in which the police had posed the question to the accused had conveyed the accusation that there were drugs in the car and that the accused had placed them there. Therefore it is expected of an innocent person to reply the way the accused did, which is that he had not placed the drugs in the car and that the car is a hired car. Those answers were consistent with innocence. Even assuming that the answers given may suggest a guilty person acting out his innocence, the evidence at best is neutral and reliance on same to prove knowledge and custody would be misplaced. (p 902 h)

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[Prima facie case not made out; accused acquitted and discharged]

Case(s) referred to:

Choo Yoke Choy v. PP [1992] 4 CLJ 1791; [1992] 1 CLJ (Rep) 43 SC (**refd**)

Leow Ngee Lim v. R [1956] MLJ 28 (**refd**)

Loo Kia Meng v. PP [2000] 3 CLJ 653 CA (**refd**)

Mat Repin Mamat v. PP [1994] 1 SLR 663 (**refd**)

Wong Nam Loi v. PP [1998] 1 CLJ 37 CA (**dist**)

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Legislation referred to:

Dangerous Drugs Act 1952, s. 37(d)

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For the PP - Norliza Yusoff DPP

For the accused - James Ghani (Marianne Ghani)

Reported by WA Sharif

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*a***JUDGMENT****Ian HC Chin J:**

The accused Thomas bin Santekh Singh is charged with two offences, one with trafficking in 60.45 grammes of Methamphetamine and the other with possession of 17.53 grammes of cannabis that took place on 29 November 2001.

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The prosecution case consisted of evidence of an ambush being laid on 29 November 2001 for a car with registration number SAA1684A. The police party laid in wait after receiving information that this car, believed to be laden with drug and driven by a male, would be headed for the car park area of Wisma Lucky Gaya Sports Centre Recreation Club, Jalan Bambangan, Inanam, Sabah.

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Shortly after midnight the accused drove the car to the said car park, stopped his car and sat there for about one to two minutes when the police party surrounded him while the engine was still running. The police asked the accused whether he had placed any drug in the car to which the accused replied in the negative.

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The police then searched the car and they found dried plant material and white crystalline substance in different places of the car. This car has a console box situated between the driver's seat and the front passenger's seat. This console box has an open box-like section for holding cassette tapes and for other knick-knacks. This box-like section of the console box was removed by the police to reveal a small black leather bag sitting at the bottom void of this console box. The black leather bag contained dried plant material. The other part of the car which the police found the white crystalline substance was the void behind the glove compartment which void was only accessible after the glove compartment was dislodged from the knobs holding it. It was after dislodging the glove compartment that a small white cloth bag was found in a void behind the glove compartment.

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The accused was confronted with the items recovered from the car and he again denied any knowledge of them. He was arrested and had since been incarcerated to await this trial. This brings me to the first issue of whether the accused was in custody or control of the items which the prosecution has to prove under s. 37(d) of the Dangerous Drugs Act 1952. That section reads:

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In all proceedings under this Act or any regulation made thereunder any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known of the nature of such drug.

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The car was rented by the accused on 19 November 2001 and it was handed to him personally by Haje bin Pisel the owner of a car rental agency and it was still on hire by him from that date to his arrest on 29 November 2001. The learned Deputy Public Prosecutor, Norliza Yusof, had referred to the meaning of custody as interpreted in the case of *Leow Nghee Lim v. R* [1956] MLJ 28 (approved by *Choo Yoke Choy v. PP* [1992] 4 CLJ 1791; [1992] 1 CLJ (Rep) 43 SC), viz.:

Custody means having care or guardianship; goods in custody are in the care of the custodian and, by necessary implication, he is taking care of them on behalf of someone else. You cannot take care of goods unless you know where they are and having the means of exercising control over them. Custody therefore implies knowledge of the existence and whereabouts of the goods and power of control over them, not amounting to possession.

In that case opium was found in an unlocked drawer of a coffee shop counter which the shopkeeper and his assistants had joint control. The shopkeeper successfully appealed against his conviction for possession of opium.

In *Choo Yoke Choy v. PP* the fact that drugs were found on the floor in a room “is not probable to suggest that the appellant alone had custody or control of the drugs since there were two people occupying the room at the material time” and “the mere fact that the drugs were found in the room does not necessarily prove that the appellant had sole custody or control.”

The prosecution had contended that the accused had knowledge and custody or control of the drugs in the car because (1) he had exclusive possession of the car between the time it was handed to him on 19 November until he was found in the car on 29 November and (2) he answered questions by the police in a certain manner.

As for the first point, one must bear in mind that the car was for public hire and an account must be given as to the state of the car before it was rented by the accused and possession given to him on 19 November. It is vital for the prosecution to establish that before the car was handed to the accused the drugs were not in the places which they were later found. Because unless that is established one cannot draw the inference that the drugs were placed in those places by the accused after he took possession of the car. If it is not established, the possibility exists that the drugs could have been placed there by a previous hirer of the car or even by the informer. There is no way this can be ruled out and this means the irresistible inference that it was the accused who had caused the drugs to be placed in the car cannot be drawn. When that inference cannot be drawn, evidence is necessary to show that it was while the car was in the possession of the accused that the drug was then concealed

- a* in the car. There is no such evidence with the result that it cannot be concluded and neither are there circumstances to justify the inference that the accused knew the drugs were hidden in those places of the car. Thus, without that knowledge the accused cannot be said to be in custody or control of the drugs. The prosecution was not able to establish the complete rental history of the
- b* car since the car was put on hire. The investigation should have been able to reveal not only the history of the possession of the car before 19 November but also between 19 November and 29 November in order to show that there was no possibility of any one else other than the accused who could have placed the drugs in the car. Such evidence is missing making it impossible to draw
- c* the irresistible inference that the accused knew there were drugs in the car which was very well hidden and which required the dismantling of the console box and the glove compartment to reveal them.

The answers of the accused to questions put by the police were also relied on by the prosecution as showing knowledge or custody or control of the drugs.

- d* This is how the prosecution had contended:

- The accused's response in saying immediately after he was told that PW2 was going to inspect the car that the car was not his may be inferred as the accused in trying to deny any responsibility or any knowledge if any incriminating things or materials were found inside the car. Why did the
- e* accused respond in such a way unless he has prior knowledge that he did have with him (the drugs).

The evidence has to be narrated a little bit more to show what really happened and they are these:

- f* The engine of that car was still on and all the windows of that car were wound up. I tried to open the door at the driver's seat but it was locked. I then knocked at the window of that car while shouting "polis, polis, buka pintu". At that time the person there did not open the door for about 1 minute. It was thereafter that he opened the door. I ordered him to get out. I introduced myself as being a police officer by showing him my authority card.
- g* I then asked the person whether he had placed in his car anything unlawful or drugs. The people denied that he had placed such thing in the car. The person said that the car is a hired car.

- It will be noticed that the circumstances and the manner in which the police had posed the question to the accused had conveyed the accusation that there were drugs in the car and that the accused had placed them there. Therefore, it is expected of an innocent person to reply the way the accused did which is that he had not placed the drug in the car and that the car is a hired car even assuming there is drug in the car. Those answers are consistent with innocence even assuming for the moment it can be argued that the answers given may
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suggest a guilty person acting out his innocence. At its best the evidence would be neutral and reliance on such evidence to suggest that the accused had knowledge and custody or control would be misplaced.

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The case of *Wong Nam Loi v. PP* [1998] 1 CLJ 37 was relied on by the prosecution as supporting the proposition that the conduct of the accused, which I have mentioned earlier, justified the conclusion that the accused knew drugs were hidden in the car. In that case drug were found inside a refrigerator placed on the hind passenger seat and the court drew the inference that the accused there knew there was drug in the refrigerator from the following circumstances:

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- (1) the accused had remained silent when the police uncovered the drug;
- (2) the accused did not protest nor exhibit any conduct consistent with his lack of knowledge of the substance; and
- (3) the accused pointed to the refrigerator and said that if there is anything illegal it would be there.

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There you have a case where the accused had kept quiet and was condemned for it. But in the present case the accused did not keep quiet but had professed his innocence and yet it was urged as showing knowledge of the drug on the part of the accused. The prosecution seems to suggest that if you open your mouth you are damned and you will also be damned if you keep quiet. Such a proposition should find no support in any court of law and it goes to illustrate how such circumstances, as silence or explanation, cannot be safely relied on as showing knowledge. In any event, not in the circumstances of this case.

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Despite the very valiant effort of the learned deputy public prosecutor, the hurdles are just too many for the prosecution to climb. Including the hurdle of the recent decision of *Loo Kia Meng v. PP* [2000] 3 CLJ 653 where the Court of Appeal held that a sample equivalent to 10% of the substance contained in a receptacle which decision, I was informed by the learned deputy public prosecutor, the Federal Court had affirmed but as yet the grounds of decision are not available. Though I am inclined to agree with her that the interpretation of a similar section of the law in the case of *Mat Repin bin Mamat v. PP* [1994] 1 SLR 663 that is that the 10% refers to the number of the receptacles holding the drug rather than the drug itself appeal to be the more acceptable interpretation, I decline to follow that case as it is a Singapore case and I am bound by *Loo Kia Meng v. PP*. In any event it matters not because the accused, as I have found earlier, cannot be said to be in custody or control of the drugs in the car as the prosecution had failed to prove that he had knowledge of their presence in the car.

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- a* In the premises I accept the contention of Datuk James Ghani and Marianne Ghani, learned counsel for the accused, that a *prima facie* case against the accused was not made out. The accused is therefore discharged and acquitted of both charges. The exhibits are to be disposed off by the police in accordance with the law but only after the disposal of any appeal against the decision
- b* herein (if any).
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